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No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

—against—

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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Certiorari Granted October 13, 1981

QUESTIONS PRESENTED

1. Whether a school board, acting under a state statutory duty to prescribe books to be used in its schools may be prohibited under the Constitution from removing from a school library or curriculum books which it believes to be educationally inappropriate for the school children?

2. Whether secondary school students have standing under the First Amendment to sue to compel a school board to retain on library shelves or in the curriculum books considered by the board to be educationally unsuitable as a result of application of the board members' personal moral, social, and political values?

3. Whether in order for a board of education to constitutionally remove books from curriculum or a school library for content based reasons it must sustain a burden of proving such removal had a substantial and material basis and that it complied with specific objective criteria?

4. Whether "political" motivation renders unconstitutional otherwise permissible actions by a board of education in removing books from a school's curriculum and library?

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 1

Statutory Provisions Involved 2

Statement of Case 4

Summary of Argument 9

Point I 13

Point II 21

Point III 33

Conclusion 44

TABLE OF CASES (STATUTES & TEXTS)

Page

Abington Township v. Schemp,
374 U.S. 203 (1963) 17
Adams v. Campbell City School District,
511 F. 2d 1242 (10th Cir., 1975) 32
Advocates for the Arts v. Thomson,
532 F. 2d 792 (1st Cir., 1976) 32, 42
Ahern v. Board of Education,
456 F. 2d 399 (8th Cir., 1972) 14
Ambach v. Norwick,
441 U.S. 68 (1979) 17, 41, 43
American Communications Ass'n CIO v. Douds,
339 U.S. 382 (1950) 44
Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 26
Brubaker v. Board of Education,
502 F. 2d 973 (7th Cir., 1974) 31
Bicknell v. Vergennes Union High School
Board of Directors, 638 F. 2d 438
(2nd Cir., 1972) 7, 27
Board of Education v. Barnette,
319 U.S. 624 (1943) 14
Brown v. Board of Education,
347 U.S. 483 (1953) 21
Cary v. Board of Education, 598 F. 2d 535
(10th Cir., 1979) 17, 37, 38
Chaplinski v. New Hampshire,
315 U.S. 568 (1941) 30
Clark v. Holmes, 474 F. 2d 928 (7th Cir., 1972),
cert. denied, 411 U.S. 972 (1973) 14, 32
Cohen v. California, 403 U.S. 15 (1971) 31

Page

Connecticut State Federation of Teachers v. Board of Education, 538 F. 2d 471 (2d Cir., 1976) 28
East Hartford Education Association v. Board of Education, 562 F. 2d 838 (2d Cir., 1977) 14, 16, 31, 43
Epperson v. Arkansas, 393 U.S. 97 (1968) 9, 14, 22
F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) 11, 26, 29, 30, 38, 39, 40, 41, 43
Ginsberg v. New York, 390 U.S. 629 (1967) 11, 24, 30
Goss v. Lopez, 419 U.S. 565 (1975) 24
Hetrick v. Martin, 480 F. 2d 705 (6th Cir., 1973) 32
James v. Board of Education, 461 F. 2d 566 (2d Cir., 1972) 10, 16
Kleindienst v. Mandel, 408 U.S. 753 (1972) 25, 29
Lamont v. Postmaster General, 381 U.S. 301 (1965) 25
Mailloux v. Kiley, 323 F. Supp. 1387, 436 F.2d 565 after dismissal, affd 448 F. 2d 1242 (1st Cir., 1971) 20
Matter of Academic Instruction of Children, U.S.F.D. No. 4, 10 St. Dept. Rep. 449 (1916) 15
Matter of Kornblum, 70 St. Dept. Rep. 19 (1949) 15
Matter of Orange County Community College Faculty Association, 9 PERB 3068 (1976) 15

Matter of Seversky, 7 Ed. Dept. Rep. 79 (1967) 15
McCollum v. Board of Education, 333 U.S. 203 (1948) 17, 23
Mercer v. Michigan Board of Education, 379 F. Supp. 580 (1974), affd. mem. 419 U.S. 1081 (1974) 32, 38
Meyer v. Nebraska, 262 U.S. 390 (1923) 13
Miller v. State of California, 413 U.S. 15 (1973) 35
Miller v. School District Number 167, 495 F. 2d 658, rehearing denied 500 F. 2d 711 (7th Cir., 1974) 23
Millikin v. Bradley, 1433 U.S. 267 (1977) 23
Minarcini v. Strongsville City School Dist., 541 F. 2d 577 (1976) 25, 26, 27, 37, 39
Minersville District v. Gobitis, 310 U.S. 586 (1940) 14, 23
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 41, 44
Pacifica NPRA 43
Palmer v. Board of Ed. of City of Chicago, 603 F. 2d 1271 (7th Cir, 1979) 14, 31
Pickering v. Board of Education, 391 U.S. 563 (1968) 44
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 13
Powers v. Mancos School District, 539 F. 2d 38 (1976) 32
Presidents Council District 25 v. Community School Board No. 25, 457 F. 2d 289, cert. den. 409 U.S. 998 (1972) 6, 7, 27, 33, 34
Procunier v. Martinez, 416 U.S. 396 25

Quarterman v. Byrd, 453 F. 2d 54
(4th Cir., 1971) 24
Right to Read Defense Committee v.
School Committee of the City of Chelsea,
454 F. Supp. 703
(D.C. Mass., 1978) 36, 37, 39
Roe v. Wade, 410 U.S. 113 (1973) 43
Rosenberg v. Board of Education,
92 N.Y.S. 2d 344 (1949) 15
Russo v. Central School Dist.,
469 F. 2d 623 (2d Cir., 1972) 24
San Antonio Independent School Dist. v.
Rodriguez, 411 U.S. 1 (1973) 28
Swann v. Board of Education, 402 U.S. 1
(1970) 21
Thomas v. Board of Education, 607 F. 2d 1043
(2d Cir., 1979) 44
Tinker v. Des Moines School Dist.,
393 U.S. 503 (1968) 21, 24, 31, 44
Todd v. Rochester Community Schools,
200 N.W. 2d 90 (1972) 34
Village of Schaumberg v. Citizens for a
Better Environment, — U.S. — 1980 26
Virginia State Board of Pharmacy v. Virginia
Citizens Consumers Council, Inc.,
425 U.S. 748 (1946) 8, 11, 25, 26, 28
Young v. American Mini-Theatres, Inc.,
427 U.S. 50 (1976) 26, 30
Zykan v. Warsaw Community School Corporation,
631 F. 2d 1300 (1980) 28, 40

STATUTES

Page

N.Y. Education Law
Sec. 1709 2
Sec. 701 2
Sec. 91.1 3
Fed. Rules of Civil Practice Rule 56(e) 40

TEXTS

68 Georgetown Law Journal.
727, 739-747 (1980) 44
81 Harvard Law Review 1045 (1968) 16
74 Michigan Law Review 1424 .....
124 Univ. of Pennsylvania
Law Review 1293 (1976) 19, 42
Cahill, R. and Hencley, S.: The Politics of
Education in the Local Community 41
Daedalus: Journal of the American Academy of
Arts and Sciences (1981) 19
Kay, V.O.: Public Opinion and American
Democracy (1961) 16, 41
Washington Post, 11/3/81, Williams, J.:
The Lure of Private Schools 19
Guidelines for the Selection of School Library
Resources, Textbooks and Other Instructional
Materials (N.Y. State Board of Regents) 38

OPINION BELOW

The opinion of the Court of Appeals is reported in 638 F 2d 404. The opinion of the active judges of the Second Circuit Court of Appeals denying *en banc* consideration and of the three judge panel appears in 646 F. 2d 714. The opinion of the District Court, Eastern District of New York is reported in 474 F. Supp. 387 (1979).

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1980. A timely petition for certiorari was filed by Petitioners herein on May 30, 1981. An order granting the petition for certiorari was entered on October 13, 1981. This Court's jurisdiction is invoked under 27 U.S.C. 1254 (i).

STATUTORY PROVISIONS INVOLVED

N.Y. Education Law Sec. 1709 (McKinney's) reads in pertinent part as follows:

> "Sec. 1709. Powers and Duties of Boards of Education
>
> The said board of education of every union free school district shall have the power and it shall be its duty:
>
> * * * * *
>
> 3. To prescribe the course of study by which the pupils of the school shall be graded and classified...
>
> 4. To prescribe the text-books to be used in the schools....
>
> * * * * *
>
> 9. To take charge and possession of ... the books, apparatus, and all school property within its district; and the title of the same shall be vested respectively in said board of education....
>
> * * * * *
>
> 13. To have in all respects the superintendence, management and control of said union free schools....
>
> 33. To have in all respects the superintendence, management and control of the educational affairs of the district and, therefore, shall have all the powers reasonably granted expressly or by implication by this chapter or other statutes."

Sec. 701 of the Education Law, subdivision 1, states in pertinent part:

"In the several cities and school districts of the state,

boards of education ... shall designate text-books to be used in the schools under their charge."

Sec. 91.1 of the Regulations of the Commissioner of Education states:

"A school library shall be established and maintained in each school. The library in each elementary school shall meet the needs of the pupils, and shall provide an adequate complement to the various areas of the curriculum."

It also requires a minimum of 1,000 titles each for a junior and senior high school library.

STATEMENT OF THE CASE

This is a civil rights action brought against a school board as a result of the board's removal of nine books from the school library shelves and from use in the curriculum and of the placement of one book on a restricted shelf able to be obtained with parental approval. Plaintiffs are five secondary school students whose sole claim of constitutional impermissibility is that such actions were taken by the school board members "...because particular passages in the books offended their social, political and moral tastes and not because the books taken as a whole were lacking in educational value." (Par. 15 of Complaint, J.A. 4). Plaintiffs have agreed by means of the filing of statements pursuant to local Rule 9(g) that

> "Although the books themselves were excluded from use in the schools in any way, defendants have not precluded discussion about the themes of the books or the books themselves." (J.A. 140).

and

> "No teacher has been instructed not to discuss the books which were removed or to refrain from discussion or comment upon the ideas and positions they represent." (J.A. 20, 28, 138, 144).

All but one of the books contain "indecent matter, vulgarities, profanities, explicit descriptions of sexual relations, some perverted, or disparaging remarks about Blacks, Jews or Christ" 638 F. 2d 404, 419; See also excerpts, printed in footnote to dissenting opinion of Judge Mansfield below, in 638 F. 2d 404, 419-422.

The facts are briefly: Three board members obtained excerpts of allegedly objectionable book materials while attending a conference of a conservatively oriented educational organization.

Some time later two of them examined the school library card index to ascertain whether such volumes were being used by the school district. It was then ascertained that nine were. Subsequently two others were discovered. (J.A. 19, 21-24, 30-42, 53, 101, 102).

As a result the other members of the board of education, Superintendent of Schools and principals were informed and shown the excerpts. At a board meeting it was agreed to remove the subject books from the libraries so that the board could read and review them. Subsequently and at the urging of the Superintendent a committee comprising four staff members and four community members was appointed to review the volumes in question and make recommendations concerning their educational suitability and whether they were in good taste, appropriate and relevant. (J.A. 20, 24, 48, 49, 60, 62, 64, 65, 69 Neither such review nor any other form of review was required by any state statute or regulations or by the regulations of the school district.

The committee, after a series of meetings, rendered its recommendations to the board based upon the criteria referred to. The Committee voted unanimously on only two of the ten (the eleventh was unavailable) books reviewed. Two books were recommended permanently removed from the library—*Down These Mean Streets* by 5-3 and *The Naked Ape* by 6-2. There was a 4-4 split on two of the books and, after an initial 4-4 split regarding *Slaughterhouse 5* it was recommended to be placed on a restricted list by a 5-3 vote. (J.A. 26, 67-69).

The board, having by this time read all of the books in question, at a public meeting on July 28, 1976 considered each volume separately and as a result retained one book by 7-0; retained one on a restricted basis by 6-0 with one vote to retain it unrestricted; one was removed by a bare majority of 4 votes with 2 votes to

retain on a restricted basis and 1 for no restrictions; one was removed by a 5-2 vote and the balance removed by unanimous vote (J.A. 26, 27, 75-79). This action was commenced as a result.

Suit was originally commenced in the New York State Courts but since a cause of action was alleged under 42 U.S.C. Sec. 1983 the defendants removed the case to the District Court, E.D.N.Y. Plaintiffs moved to remand contending in support thereof that no substantial federal question of law existed by virtue of the ruling of the Second Circuit in *President's Council District 25 v. Community School Board No. 25*, 457 F. 2d 289, *cert. denied* 409 U.S. 998 (1972). The motion was denied.

Thereafter defendants moved for summary judgment annexing to the moving papers, in addition to affidavits of the board members and Superintendent, numerous board documents and releases, member's letters and other material illuminating the issue. (J.A. 21-122). Plaintiffs cross moved for summary judgment. Plaintiffs' cross motion was unsupported by evidentiary materials of any kind. Plaintiffs did not refute any of the allegations contained in defendants' moving papers as is required by Rule 56(e) F.R. Civ. P. Counsel for both parties assured Judge Pratt that the Court had sufficient evidence before it to render a judgment and that no trial was necessary.

The District Court (Pratt, J.) granted summary judgment to defendants holding that *Presidents Council*, supra, was controlling and that the right of a school board to remove library books which its members found inconsistent with the basic values of the community that elected it was resolved by the statement in *Presidents Council* that a book " '...improperly selected for whatever reason could be removed by the same authority which was empowered to make the selection in the first place.' " (457 F. 2d p. 293).

Plaintiffs appealed and in a sharply divided opinion the Second Circuit reversed and remanded for trial. Judge Sifton (sitting by designation) wrote the majority opinion with which Judge Mansfield sharply dissented contending, *inter alia*, that "...the majority unjustifiably overrules our sound decisions in the indistinguishable case of [*Presidents Council*, supra ...]" (638 F. 2d 419). Both judges felt there were sufficient facts before the court, as a result of the defendants' papers supporting the motion for summary judgment and depositions of two board members, to grant summary judgment (638 F. 2d 432), and both found no distinction between the case at bar and a companion case (*Bicknell v. Vergennes Union High School Board of Directors*, 638 F. 2d 438) (argued the same day and decided the same day in which dismissal of a complaint against a school board was affirmed.) Yet the case was remanded to trial—primarily to ascertain motivation.

Defendants moved for rehearing and suggested *en banc* consideration. After many months rehearing was denied and the active Judges of the Circuit split five to five on the suggestion for *en banc* consideration effectively denying same. Judge Mansfield dissented from such denial (with which dissent four other judges concurred) stating that "...nothing will be gained by a remand since Judge Sifton's view ... would virtually mandate a decision for the plaintiffs." (at 416, 417).

The Majority opinon of Judge Sifton held that as a result of the "...unusual and irregular intervention in the school libraries operations..." perceived by him the defendants had the

> ...burden of establishing that there was a substantial and material basis for their actions and that their actions were possessed of sufficient procedural regularity [by means of application of narrowly specific

> criteria] to give a better basis than guesswork as to how the board of education would act in the future with regard to similar issues. (638 F. 2d at 414, 417).

Judge Newman, concurring in the result felt that a trial was required to determine whether defendants' actions "...looking forward from the time they were taken created a sufficient risk of suppressing the ideas to constitute a violation of the First Amendment" (638 F. 2d 438. See also f.n. 9) but declined to join in requiring precisely drawn rules or guidelines.

Both majority judges perceived the issue of possible political motivation in the board's decision to be essential in determining constitutional permissibility.

Neither of the majority opinions addressed the issue of the plaintiffs' standing to bring suit under the "right to know" or "right to receive" doctrine recently expanded by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* (425 U.S. 748 (1976) while the dissent rejected such doctrine as "...having no application to the facts of this case." (638 F. 2d 429).

SUMMARY OF ARGUMENT

The Court is presented with a classic conflict among competing concepts, all of which have historically received social and judicial recognition, but which have not yet been addressed by this Court in the context presented. The decision of the Court requires the striking of a delicate balance between the conflicting interests at stake in a manner that will not compel the federal court system to continuingly address the specifics of actions such as those complained of.

The requirement of judicial restraint has nowhere been as strong as when the courts are addressing the result of discretionary actions of local school boards acting under state statutory mandate. It has long been recognized that in such circumstances there is a much stricter and higher threshold for a finding of constitutional impermissibility. It will not be denied that the constitution has properly gained entrance to the nation's school houses, however the contexts in which such a principle has been recognized involve "purer" expression and more direct and personal student rights than those asserted here to question board determination of curricular materials.

The vast discretion afforded boards of education in this regard and the importance of local control of educational decision making and need for judicial caution were made plain by the Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968) where not only the majority opinion (at 107) but Justices Black (at 111) and Stewart (at 115) cited the unquestioned right of school boards to choose curriculum. In stating the need for judicial restraint in public school matters the Court established the requirement of a sharp and direct implication of "basic constitutional values" before judicial interference is justified (at 104). The majority also implied that curricular decisions did not sharply and directly

implicate such values unless the teaching of a theory or doctrine or body of ideas was prohibited.

That such is not the case here is amply set forth in statements filed by the parties pursuant to Local Rule 9(g) (J.A. pp. 20, 128, 131, 138, 140, 144) and evidenced by the unopposed affidavit of the Superintendent of Schools (J.A. p. 121). These documents amount to an admission of Respondents that there has been no suppression of ideas and any attempt to compel a trial in an effort to ascertain what was already agreed is to usurp the lower court's valuable time.

Another deeply established and essential theory for the proper functioning of our public schools is that permitting (or even requiring) local school boards to establish and apply their curriculum in such a way as to transmit community values (*James v. Board of Education*, 461 F. 2d. 566 (CA 2, 1972). It is no doubt this prescriptive function of secondary education (as contrasted with the analytical or "marketplace of ideas" function of higher education) that makes so necessary local control and judicial restraint. Such a function, of necessity, requires subjective rationale in the decision making process.

It cannot be denied that, especially with a board function to transmit community values, there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political. Much has been made in the court below of the possibility of "political motivation" for the board's actions. Although the record discloses none it is submitted that such motivation would not taint their actions since a public school through its curriculum is an instrument of political socialization, the board is a political subdivision of the state and all school systems carry on some form of political indoctrination in the better sense of the word.

The interest of the state in protecting juveniles from the content of indecent expressions, has received approval from this Court in *Federal Communications Commission v. Pacifica Foundation* 438 U.S. 726 (1978) where the Court held that the F.C.C. may impose sanctions for broadcasting language found "indecent" though not obscene. Content regulation is admittedly scrutinized very carefully by the Federal courts, but it is asserted here that within the unique social structure of the public schools such scrutiny should give way to other compelling interests.

Not only are the student plaintiffs juveniles and thereby not possessed of as full blown a constitutional right as adults (*Ginsberg v. New York*, 390 U.S. 629 (1967), but there is serious doubt that they have standing to assert what rights they may have in the case at bar. They are not asserting a right of "pure speech" or even "symbolic speech", but are asserting a right to receive the information contained in the proscribed books. This right is derived, so they claim, from a line of "right to know" cases culminating in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* 425 U.S. 748 (1976). These cases are inapposite, however, since *Virginia Board* relates to purely commercial speech and neither it nor the prior cases concerned the limited rights of juveniles.

It should be remembered that the issue is not what a particular jurist would have done were the judge a board member, but whether the Federal Constitution mandates a review of decisions made by Petitioners on the basis of personal values. Their actions are subject to disapproval in the normal course of school board electoral politics. They must operate under the majority principles of municipal corporation law. To accede to the wishes of a militant few in their community would be to disregard their

electoral mandate. Were the students to prevail in their search for a due process hearing for library books once shelved, all prior "mistakes" in selection would be immutably cast in bronze.

Petitioners' actions have been rational and were in furtherance of a valid community interest. They were taken in the unique environment of the public schools. They possessed sufficient statutory and common law discretion to discharge their responsibilities in such a way as to outweigh the individual interests of the student plaintiffs.

1. THE BOARD POSSESSES THE STATUTORY AND COMMON LAW AUTHORITY TO MAKE DETERMINATIONS CONCERNING THE SUITABILITY OF CURRICULAR MATERIALS INCLUDING LIBRARY BOOKS AND IN DOING SO MAY VALIDLY ATTEMPT TO TRANSMIT COMMUNITY VALUES TO THE STUDENTS IN ITS CHARGE.

a. Board authority to establish curriculum.

The power of the state to establish a curriculum for use in the public schools has long been recognized by the courts. In *Meyer v. Nebraska*, 262 U.S. 390 (1923) the Supreme Court struck down a Nebraska statute which made it illegal to teach a foreign language to students who had not completed the eighth grade. In so doing Justice McReynolds, writing for the majority, cited the power of parents to control their children's education and acknowledged limitations on that power in the following language:

> The power of the state to compel attendance at some schools and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. (262 U.S. at 402)

Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court, citing *Meyer*, found a statute denying parents the right to send their children between 8 and 16 years of age to private schools unconstitutional. In its decision the Court reaffirmed the state's authority to control curriculum stating

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise

> and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught and that nothing be taught which is manifestly inimical to the public welfare. (268 U.S. at 543).

Although both of these cases were decided upon the basis of substantive due process and did not refer to the First Amendment the propositions cited above continue to reflect the present judicial understanding of a state's authority.

Such authority has been more recently reaffirmed by this Court in *Board of Education v. Barnette*, 319 U.S. 624 (1943) where (p. 631) the dissent of Justice Stone in *Minersville District v. Gobitis*, 310 U.S. 586 (1940) was cited in support of a state's right to compel the inspiration of patriotism and love of country. In *Epperson v. Arkansas*, 393 U.S. 97 (1968) Justice Fortas, for the majority, stated that the state had an "...undoubted right to prescribe the curriculum for its public schools..." (p. 107) while Justice Stewart, concurring, stated that "The States are most assuredly free 'to choose their own curriculums for their own schools' " (p. 115). The lower federal courts have continued to recognize the authority of the states over curricular matters. See *East Hartford Education Association v. Board of Education*, 562 F. 2d 838 (CA 2, 1977) p. 843; *Palmer v. Board of Ed. of City of Chicago*, 603 F. 2d 1271 (CA 7, 1979) p. 1273; *Clark v. Holmes*, 474 F. 2d 928 (CA 7, 1972), *cert. denied*, 411 U.S. 972 (1973); *Ahern v. Board of Education*, 456 F. 2d 399 (CA 8, 1972).

There are 16,500 school districts in the nation today whose operations and decision making processes are conducted in the large part by elective boards of education acting as political subdivisions of the state.* The state legislatures mandate basic core

*From 90% to 95% of the nation's school boards are elective.

requirements and have delegated the bulk of authority to these school boards either expressly or impliedly. Apart from mandated matters they historically exercise wide latitude and discretion.

In New York State there have been broad statutory grants of power to union free school districts, of which Island Trees is one. Among the broad powers granted Petitioner board is "To prescribe the textbooks to be used in the schools...", "To take charge and possession of [and title to] ...the books... within its district;..." and "To have in all respects the Superintendence, management and controls of said union free schools..." (See "Statutes Involved," supra).

Although New York State courts and administrative agencies have not addressed the precise issue at hand they have held that a board may in its discretion determine whether or not to provide a certain non-mandated course of instruction (*Matter of Serverski*, 7 Ed. Dept. Rep. 79 (1967); a board may determine the character and extent of instruction (*Matter of Academic Instruction of Children U.F.S.D. #4* 10 St. Dept. Rep. 449 (1916); a board may not be compelled to remove instructional materials to which parents object (*Rosenberg v. Board of Education* 92 N.Y.S. 2d 344 (1949); the right to select instructional materials is a matter of public policy and therefor not a mandatory topic of union bargaining (*Matter of Orange County Community College Faculty Association*, 9 PERB 3068 (1976) and that a board may discontinue a periodical to which is has previously subscribed (*Matter of Kornblum*, 70 St. Dept. Rep. 19 (1949) .)

In exercising their discretion under the broad powers and responsibilities to establish courses of instruction and to prescribe curriculum school boards should and do transmit the consensual values and attitudes of the school community to the students in their charge. It is this effort at inculcating and indoctrinating

community values that sharply distinguishes the nation's secondary schools from its universities and colleges where a less prescriptive "marketplace of ideas" or analytical model governs. (Goldstein, S., *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293, 1297, 1342-44 (1976).

This conception of the role of secondary education in our society has been accepted by the courts of the nation and is an essential and obvious concomittant to the traditional theory requiring local control of public education. Professor T. Emerson in *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045 (1968) p. 1149 has reflected on this link by stating that "Public opinion strongly supports continued local control apparantly because local responsibility tends to insure that educational policies reflect the needs of the individual community."

b. **Duty to transmit community values to students.**

In *East Hartford Ed. Assn. v. Bd. of Ed.*, 562 F 2d 838 (CA 2, 1977) p. 859 the Second Circuit sitting *en banc* affirmed the statement in *James v. Board of Education*, 461 F 2d 566 (CA 2, 1972) p. 573 that a "principal function of all elementary and secondary education is indoctrinative ... to transmit the basic values of the community."*

The transmission of community values by the elementary and secondary schools of the nation fulfills not only the function of reflecting "the value system and educational emphasis which are the collective will of those whose children are being educated and

*If, as stated by V.O. Key, Jr. in *Public Opinion and American Democracy* (1961), all national educational systems indoctrinate students with basic values, outlooks and beliefs which values "permeate the entire school curriculum from the kinds of problems posed in arithmetic to the formal instruction in civics" (at p. 316) it is little wonder that such is also the role, on a different scale, of the diverse independent school districts comprising the national system.

who are paying the costs" (*Cary v. Board of Education*, 598 F. 2d 535 (CA 10, 1979) p. 543). It celebrates the wonderful diversity of this nation.

One of the great strengths of our Nation is its variety of cultures, beliefs and values. The school districts of America come in all sizes and shapes and emphasize, within their state mandates, a bewildering variety of values. Some believe in high rates of expenditure; some grant great freedom and leeway to teachers and students; some believe that the "basics" are to be emphasized rather than far reaching electives; some are peopled by wealthy college graduates and others by less affluent blue collar workers, and on *ad infinitum*.

There are changes within the same district from time to time as demographic and social changes occur there and in surrounding areas. Not to permit a board of education to utilize its own values and probably, since these are elected officials, those of the community in its decision making process would cast a true "pall of orthodoxy" over the educational process. The Court in *McCollum v. Board of Education*, 333 U.S. 203 (1948). Justice Jackson concurring at p. 237, recognized this changing nature of school boards when he noted that they represented and served "highly localized groups which not only differ from each other but which themselves from time to time change attitudes." (See also *Abington Township v. Schempp*, 374 U.S. 203 (1963) p. 300; *Ambach v. Norwick*, 441 U.S. 68 (1979) p. 77).

Island Trees is a distinctive community separate and apart in many respects from many other school districts in the county in which it is located. It is identifiable in only one context—that of a school district. There is no post office address known as Island Trees.* There is no Village with its identifying features of a commons or a Main Street, a Mayor and Village Council and

*It is part of Levittown, N.Y. for mailing purposes.

businessmen's clubs. There is no separate fire department or police force. There is only the school system as a source of a distinctive identity and as such it assumes tremendous importance to its residents and electors. Its tax base can be (and is) vastly different from that of other districts in the county. Its socio-economic makeup is different.* Its residents have certain values and interests which have drawn them to this community. It has elected (and re-elected on a number of occasions after the events giving rise to this litigation) The Petitioner board of education with the tacit understanding that it will perform its duties in such a way as to transmit the basic values of the community to the district's students in accordance with the prescriptive model referred to.

c. Need for value judgments by board.

The nation's public schools are in trouble. Although our youth are better educated than ever, our adults are enjoying a higher standard of living than previously, we are educating more universally in less segregated systems—our secondary schools are in trouble. Academic standards are diminishing, disciplinary problems and vandalism are increasing, funding is diminishing and students who are able are avoiding the public schools in favor of private. Our school curricula have become debased and watered-down and there is an ever recurrent fear of diminishing moral and social values being taught as a result of a "crisis of authority." See Brief of *amicus* National Association of Secondary School Principals, p. 12; Daedalus: Journal of the

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*In *The New York Times Guide to Suburban Public Schools*, Macroff, G., (1976), it is described as "a blue collar district in southeastern Nassau County that is not even a real community...very, very middle class in make-up..[with a] miserable tax base" (p. 35)

American Academy of Arts and Sciences (1981) Kerst, M., *Loss of Support for Public Secondary Schools: Some Causes and Solutions* (pp. 45-68), Cohen, D., *The Failure of High Schools and the Progress of Education* (pp. 69-89), Grant, G., The *Character of Education and the Education of Character* (pp. 135-149); The Washington Post 11/3/81, Williams, J. *The Lure of Private Schools; Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1968) dissent of Justice Black at pp. 524-526.

In addition there is ever diminishing discretion vested in local school authorities as a result of increased mandates resulting from the expanding role of federal and state regulation, increasing involvement of advocacy groups active in the nation's courts and burgeoning representation of school board employees by unions and the resultant labor contracts. One of the few areas of discretion left to the local boards is that of curriculum and that too is somewhat limited by the materials made available by the book publishers and instructional material suppliers.

This last remaining prerogative has of late been subject to numerous attempts at encroachment by professionals seeking greater power than that gained in collective bargaining. The brief of the New York State United Teachers in the court below asserted the right to select texts. No doubt the American Library Association will assert a similar right regarding library books. It must be remembered however that although a teacher is equipped by special training to decide matters of pedagogical methodology one, especially if a non resident, should not be able to make important value judgments concerning the environment a district wishes for its children.* Goldstein, S., 124 U. Pa. L. Rev. 1293 (1976) pp. 1335-39, 1356.

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*A survey taken at the time the events complained of occurred showed that only 5% of the professional staff of Island Trees resided in the district. (Oglesby aff. J.A. 118).

That teacher control of curriculum is at variance with the principle that inculcation of societal values is a major function of American public education is aptly shown by the statement of the District Court in *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392, 436 F. 2d 565, after dismissal, aff'd. 448 F. 2d 1242 (CA 1, 1971) that

> The secondary school more clearly than the college or university acts *in loco parentis* with respect to minors. It is closely governed by a school board selected by a local community. The faculty does not have independent traditions, the broad discretion as to teaching methods, nor usually the intellectual qualifications, of university professors. Among secondary school teachers there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity. Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching "the best that is known and taught in the world", training by established techniques, and to some extent at least, indoctrinating in the mores of the surrounding society. While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity. Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which, though reasonable, is not approved by the school authorities or by the weight of professional opinion. A secondary school student, unlike most college students, is usually required to attend school classes, and may have no choice as to his teacher.

In applying the First Amendment in the contexts set forth above there has to be cognizance of the fact that value judgments must be made constantly by those charged by the electorate with transmitting the community's moral and societal values,

especially as regards instructional materials such as texts and library books. These decisions pose many problems in the areas of academic freedom and freedom of expression for both the teachers and the students of a given district and have spawned much litigation.

No determination has yet been made by the Supreme Court regarding the extent to which a school board member may utilize personal values in making curricular decisions within permissible constitutional limits. In applying First Amendment principles in a public school context cognizance of the fact that it is necessary to make these value decisions must be taken. An awareness of the uniqueness as well as the importance of public education and the need for judicial restraint must be kept paramount in doing so. The constitutional role of a school board in public education is at the heart of the controversy before the Court.

II. THE BOARD'S ACTION IN REMOVING CERTAIN VOLUMES FROM LIBRARY SHELVES AND FROM USE AS TEXTBOOKS DID NOT INFRINGE UPON PLAINTIFF STUDENTS' FIRST AMENDMENT RIGHTS AND DOES NOT JUSTIFY JUDICIAL INTERVENTION.

While it is unquestionable that "education is perhaps the most important function of state and local governments" *Brown v. Board of Education,* 347 U.S. 483 (1953) p. 493; that "boards of education are traditionally charged with broad power to formulate and implement educational policy" (*Swann v. Board of Education,* 402 U.S. 1 (1970) p. 16) and that value inculcation is a primary function of local boards of education it is equally true that students do not "shed their constitutional rights at the schoolhouse door." *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) p. 506. Most of the decisions involving the necessary careful balancing of these conflicting interests have arisen at the college or

university level, have involved employment rights of staff members or have involved much purer expression than that in question in the case at bar. Some guidance can be obtained however from an examination of the principles addressed in these cases if not from a comparison of the fact situations.

a. The need for judicial restraint.

An Arkansas statute making it unlawful for a teacher to teach the doctrine of evolution was addressed in *Epperson v. Arkansas,* 393 U.S. 97 (1968) in which all but two of the Justices of the U.S. Supreme Court held that the statute violated the establishment of religion clause of the First Amendment while the remaining two found it to be unconstitutionally vague. Although the Court declined to rest its decision on academic freedom grounds it recognized the difficulty of applying First Amendment principles in the unique environment of the public schools. At p. 104 the majority stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

and stressed the necessity of constitutional safeguards and the avoidance of a "pall of orthodoxy" in the nation's schools.

The federal court system has continued to recognize the need

for extreme caution in involving itself in the decision making processes of the public schools. The U.S. Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203 (1947) p. 237, (Jackson, J. concurring), has stressed the importance of not being induced "to accept the role of a super board of education for every school district in the nation." Citing the "subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified..." the Court in *Minersville District v. Gobitis*, 310 U.S. 586 (1939) p. 598 eschewed turning "the courtroom into an arena for debating issues of educational policy." In the more recent case (involving school segregation) of *Millikin v. Bradley*, (433 U.S. 267) (1977) the Court stressed the need to take local school authorities' interest in self management into account in fashioning remedies.

This natural and historical disinclination is even more necessary in such sensitive areas as that involved in the case at bar, i.e. the exercise of moral value judgments. Petitioner board members do not profess the technical expertise of their librarians or the knowledge of literature possessed by the teachers of English. It is possible that they have made an unwise or imprudent decision or one with which possibly no member of the Court would agree, but the question is not how this Court would act were its members board members, but whether the Federal Constitution commands this or a trial court to review a decision which board members have made on the basis of their personal opinion of educational suitability. (*See Miller v. School District #167*, 495 F. 2d 658, rehearing denied 500 F. 2d 711 (CA 7, 1974) p. 666, Opinion of Stevens, J. upholding termination of non-tenured teacher due to board disapproval of his beard and sideburns). Petitioner school board members had a difficult and delicate task, but they exercised their discretionary power over curricular materials in the way they believed to be best at the time. It is submitted that an

affirmance of the decision of the lower court herein would create an even more "unprecedented intrusion into the process of elementary and secondary education" than that which the minority foresaw in *Goss v. Lopez*, 419 U.S. 565 (1975) at p. 585.

b. The student plaintiffs possess no standing to assert First Amendment rights or at best, possess substantially diminished First Amendment rights.

Respondents were juveniles at the time the events complained of took place. Although there have recently been judicial diminutions in the disparity between juvenile and adult constitutional rights there is still no question whatever but that the "experience of mankind, as well as the long history of our law" recognize vast differences between the rights and duties of children as compared with adults which "must be accomodated". *Goss v. Lopez*, 419 U.S. 565 (1975) dissent at p. 591 citing Mr. Justice Stewart's concurrance in *Tinker v. DesMoines*, supra p. 515. See also *Quarterman v. Byrd*, 453 F. 2d 54 (CA 4, 1971) pp. 57, 58; *Ginsberg v. New York*, 390 U.S. 629 (1967) at 638; *Russo v. Central School Dist.* 469 F. 2d 623 (CA 2, 1972) p. 631.

It is very much in doubt however whether these particular juvenile plaintiffs have any standing whatever to assert First Amendment rights in the context of Petitioners' actions. The First Amendment guarantees freedom of expression and there is no question but that this guarantee has been expanded beyond the ambit of pure speech to symbolic expression and has been extended to protect juveniles in the school environment. It has not yet however been extended to protect a student who wishes to read instructional materials deemed inappropriate for whatever reason.

The students' First Amendment claims must be founded on the "right to receive" information referred to by the Sixth Circuit in a very similar case (*Minarcini v. Strongsville City School Dist.*, 541 F. 2d 577 (1976). In holding that the removal by a school board of library books because they were socially and politically distasteful violated the First Amendment the court, after referring to the "right to know" as a "somewhat more difficult concept than a direct restraint on speech" (at 583), recited the line of authorities establishing such a right. The Court admitted to doubtfulness "absent [the] very recent Supreme Court case" of *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* 425 U.S. 748 (1976).

In *Virginia State Board of Pharmacy*, supra, the Court struck down a state statute banning price advertisements at the request of consumers citing, among others, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Kleindienst v. Mandel*, 408 U.S. 753 (1972) and *Procunier v. Martinez*, (460 U.S. 396) (1974) for the proposition that First Amendment protection is afforded both the source and recipients of communication where a "speaker" exists (425 U.S. at 756). The Court described the right to receive information as a "reciprocal right" (at 757).

In *Lamont*, supra, the Court upheld the rights of adult citizens to receive political publications sent from abroad striking down a regulation requiring the filing of a signed card for each piece requested. It did not hold that an addressee has a constitutional right to receive particular materials through the mails. In *Kleindienst*, supra, the Court upheld the exclusion of a Communist scholar from the country, depriving his audience of their "right" to hear his message. The decision was based upon the greater plenary power of a sovereign nation to bar aliens, but the Court recognized that First Amendment rights were implicated. *Procunier v. Martinez* involved broadly written prison regu-

lations permitting censorship of mail. In striking down the regulations because they did not "further an important or substantial government interest unrelated to the suppression of expression", (at 413.) Justice Powell suggested that a less far reaching statute directed at suppressing material jeopardizing legitimate government interests would be upheld (at 416). It is understandable that the *Minarcini* court would have found it difficult to support the students' claimed "right to know" without the support of *Virginia State Board of Pharmacy*, supra.

None of the cited cases dealt with the need for balancing important limitations upon First Amendment protections; all concerned adult claims; none touched upon the unique environment of the public schools and all involved a reciprocal communicator in whom was vested definitive constitutional rights.

Virginia State Board of Pharmacy, supra, upon which most courts supporting a student's "right to know" rely, is even more readily distinguishable. It involved solely commercial speech and, since the courts must pay heed to the " 'commonsense differences' between commercial speech and other varieties (*F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), p. 744, citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)), cannot be controlling in the case at bar. This Court itself has recently described *Virginia State Board of Pharmacy* as holding that "the First Amendment affords some protection to *commercial speech*" (*Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), rehearing denied 429 U.S. 873 (1976), p. 68, emphasis provided) and has further referred to having "swept even the most banal *commercial speech* within the ambit of the First Amendment" in *Virginia Board (Village of Schaumberg v. Citizens for a Better Environment* — U.S. — (1980), dissent of Justice Rehnquist, emphasis provided.)

More important, however, than attempting to distinguish

Virginia State Board of Pharmacy is to show its inapplicability to the case at bar on more substantive grounds. In permitting the appellees in *Virginia Board* to assert the reciprocal of the right to advertise, e.g. the right to receive the advertising (p. 757) the Court recognized that wherever the "right to receive" was asserted it could not stand on its own, but must be grounded in its reciprocal —a right to express communication in some form. Since the publishers and authors of the books at issue herein would possess no conceivable right to bring an action against Petitioners on First Amendment grounds how possibly can the student Respondents successfully assert a reciprocal right?

The illogic of thus applying the holding in *Virginia Board* has been apparent to all Circuit Courts considering "book banning" litigation since the Sixth Circuit in *Minarcini*, supra, seized upon it in an attempt to support the students' otherwise doubtful claim. Even the Second Circuit while deciding the case at bar made no comment either way concerning the existence or non-existence of a "right to know" which, standing by itself, could support the students' claim, although the matter had been briefed and argued before it. However, Judge Mansfield in his dissent (638 F. 2d 404, 429) stated that he considered that the viability of the holding in *President's Council, District 25 v. Community School Board, No. 25* (457 F. 2d 289 (CA 2, 1972), *cert. denied*, 409 U.S. 998) that a board's removal of a book from a school library because it was offended at its content did not violate the First Amendment, was undiminished. Judge Mansfield directly rejected the pertinency of *Virginia Board* since the students' rights were no greater than those of the authors and publishers of the books. The fact that the companion case to the one at bar, *Bicknell v. Vergennes Union High School Board of Directors*, 638 F. 2d 438 (CA 2, 1980), concerning similar circumstances, was decided in favor of the school board without any comment whatsoever regarding the import of *Virginia Board* indicates its rejection as irrelevant.

The Seventh Circuit in *Zykan v. Warsaw Community School Corporation*, 631 F. 2d 1300 (1980) p. 1304, after referring to "the qualified 'right to hear' that has lately emerged as a constitutional concept. (citing *Virginia Board*)", proceeded to reject its applicability as a result of the presence of two factors already referred to above i.e. the lesser constitutional rights flowing to a juvenile than to an adult and the necessity for transmitting moral values to students of the public schools. It appears clear therefor that although there has been a gradual extension of a qualified right to receive information as a constitutionally protected right under the First Amendment it has not yet been applied to the non adult, non commercial environment of the secondary schools. Nor can nor should it be. It exists only as a reciprocal right gaining vitality as the result of anothers right to affirmatively communicate. Publishers and authors do not have such a right with respect to the public schools and students do not possess its reciprocal. If they did could they not extend it to affirmatively compel the acquisition of desired instructional materials or the revision of a curriculum. Since they do not possess the greater right to an education (*San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) it would be surprising if they possessed a lesser one to direct the content of an education.

In the case at bar the information which Respondent students seek to "know" is readily available from other sources.* It has been stated in *Connecticut State Federation of Teachers v. Board of Education*, 538 F. 2d 471 (1976), in a matter where the court held a teachers' union not to have a First Amendment right to utilize teacher mailboxes for distribution of union literature, that

> The availability of alternative means of communica-

*It is interesting to note that the nine "banned" volumes were subsequently placed in a special showcase at the Island Trees Public Library and sustained extremely heavy use from the public library borrowers after the events complained of.

> tion is a relevant factor in any case in which First Amendment rights are arrayed against asserted governmental interests. (citations omitted) (at 481).

This Court in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) f.n. p. 750, recognized the importance of alternative means by commenting on the ability of adults to obtain tapes of indecent materials banned by the F.C.C. because of probable exposure to children. See also *Kleindienst v. Mandel*, supra, p. 765 where this Court referred to alternative means of access as a "relevant factor" should a balancing of rights be called for.

c. The school board may make a content based decision as a result of personal judgment as to suitability of instructional materials.

The public has a legitimate interest, expressed through its elected school board, in promoting respect for decency, authority and other traditional values. In utilizing the members' personal value sets while exercising their broad discretionary powers regarding curriculum they are compelled to make subjective content based decisions. It is the nature and essence of the office they hold and of the trust imposed upon them by virtue of their election as stewards of the district's school age children for whom they stand *in loco parentis* during the school day. To do less would be a violation of trust. In applying their concept of educational suitability to library (and other) materials as part of the decision making process they are not attempting to be ideological proselytizers. They are making sensitive and difficult decisions whether or not these specific materials are consistent with basic community values in an effort to comply with their legislative and philosophical mandate.

There are limitations on the First Amendment guarantees of free speech even in the context of subjective content based restrictions thereon. See *Chaplinski v. New Hampshire*, 315 U.S. 568 (1941) holding that a statute punishing the use of "fighting words" did not impair liberty of expression; *Ginsberg v. New York*, 390 U.S. 629 (1967) upholding a statute barring the sale of materials not considered obscene for adults to persons under seventeen years; *F.C.C. v. Pacifica Foundation*, supra, permitting the imposition of sanctions against a radio station for broadcasting language found "indecent" though not obscene. See also *Young v. American Mini Theatres, Inc.*, supra at 2451, where the Court made it "clear, however, that the content of a particular advertisement may determine the extent of its protection."

If the protections afforded by the First Amendment are not absolute; if indecent language can be regulated and if the nation's public schools are truly unique it follows that the board's actions need only meet a very low threshold of constitutional scrutiny.

The students may well argue that the language objected to by Petitioners was no different from that to which they were exposed when not at school. This is still no reason why the school board must place its imprimatur on such language or to give it an appearance of legitimacy.* There is no reason why the matters attempted to be communicated by the authors of the proscribed volumes could not be done so with less explicitness, less vulgar language, fewer sexual allusions and in a more tasteful manner. As Justice Stevens, writing the plurality opinion in *F.C.C. v. Pacifica*, (p. 743 n. 18,) observed—"There are few, if any, thoughts that cannot be expressed by the use of less offensive language." It is doubted that the more "prudish" values of the 19th Century "in any way limited or affected expression of serious literary, artistic,

*For a detailed statement of the language deemed unsuitable by the board see Judge Mansfield's dissent in the lower court. (638 F. 2d. 404, F.N. 1 pp. 419-422)

political or scientific ideas." (*Miller v. California*, supra, at p. 35, Justice Black dissenting.)

Respondents may not find solace in the holding of this Court in *Cohen v. California*, 403 U.S. 15 (1971) reversing the conviction of Mr. Cohen for having worn a jacket bearing a four letter expletive in a courthouse. It is suggested that Mr. Cohen could have been constitutionally barred from a schoolhouse.

Tinker v. Des Moines, supra, is also inapposite for a number of reasons. The foremost distinction is the nature of Mr. Tinker's expression. It was "closely akin to 'pure speech.'" (393 U.S. at 505.) and it must be remembered that "As conduct becomes less and less like 'pure speech' the showing of governmental interest required for its regulation is progressively lessened (citations omitted)." (*East Hartford Ed. Ass'n. v. Bd. of Ed.*, 562 F. 2d 838 (1977) p. 858.)

There is guidance for the Court, however, in a number of cases involving teacher dismissals for the alleged exercise of rights protected under the First Amendment. Their pertinence is greater in view of the seriousness of termination of employment or other disciplinary action and of plaintiffs' adult status as well as the "pureness" of their speech.

In *East Hartford*, supra, the Second Circuit, sitting *en banc*, reversed the holding of a three judge panel and upheld the constitutionality of a teacher dress code. In *Palmer v. Board of Education*, 603 F. 2 1271 (1979) the Seventh Circuit upheld the dismissal of a teacher who refused to teach a certain curriculum because she was a Jehovah's Witness, the court basing its decision on the "traditionally broad discretion that has always rested with local school authorities to prescribe curriculum." (p. 1273). In *Brubaker v. Board of Education* the Seventh Circuit sitting *en*

banc upheld the dismissal of a teacher for distributing what the board felt was an indecent poem and brochure in class. (502, F. 2d 973 (1974). Citing the power of the state to control curriculum, the District Court (E.D. Mich.) in *Mercer v. Michigan Board of Education*, 379 F. Supp. 580 (1974), aff'd mem. 419 U.S. 1081 (1974) held that a teacher's academic freedom rights were not infringed by a statute prohibiting discussion of birth control in class. See also *Clark v. Holmes*, 474 F. 2d 928 (CA 7, 1972), *cert denied* 935 Ct. 2148 (1973); *Adams v. Campbell City School District*, 511 F. 2d 1242 (CA 10, 1975); *Hetrick v. Martin*, 480 F. 2d 705 (CA 6, 1973).

In *Powers v. Mancos School District*, 539 F. 2d 38 (CA 1976) the plaintiff alleged termination as a result of board objection to his presentation in class of "works of art". In sustaining the trial court which found his exercise of First Amendment rights had not been shown to have played a part in his termination, the court stated (regarding the process of determining whether or not to terminate a teacher)

> ...[I]t would be unrealistic to deny to Board members the right to employ subjective rationale in the decisional processes. Subjective considerations are of course those personal to the individual Board members....
> We suggest that it is both impossible and inadvisable to eliminate subjective rationale from the decision making process...
> In any event, courts are well-equipped to exercise processes superior to those persons empowered by statutes to operate schools. (p. 44)

The "ultimate necessity of subjective judgment" regarding the selection of written materials for voluntary public consumption was cited by the First Circuit in *Advocates for the Arts v. Thomson*, 532 F. 2d 792 (1976) (p. 797) in upholding the state's

refusal to approve a grant for an art magazine due to allegedly indecent materials that it contained. It is respectfully suggested that this Court also recognize the necessity of subjective judgments in the delicate task of governing the nation's public schools.

III. THE BOARD'S ACTIONS WERE NOT IRRATIONAL OR ARBITRARY; WERE NOT IN FURTHERANCE OF THE SUPPRESSION OF IDEAS; WERE NOT UNCONSTITUTIONALLY MOTIVATED; WERE NOT SUBJECT TO A NEED FOR NARROWLY DRAWN REGULATIONS AND MET ALL APPLICABLE CONSTITUTIONAL STANDARDS.

a. Petitioners have not acted unreasonably, arbitrarily or irrationally.

During the course of this litigation the school board has been accused of all forms of unconstitutional behavior by opposing counsel, Respondents' *amici* and the press. It has been charged that they have suppressed ideas, acted from political motivation, cast a "pall of orthodoxy" over the school system, excluded unpopular viewpoints, and have been in general arbitrary and irrational.* However, if one can stand free of the emotions and turmoil normally touching events such as these and view the record rationally it is difficult not to agree with Judge Mansfield when he stated (p. 422) that "the Board acted carefully, conscientiously and responsibly after according due process to all concerned." When a respected jurist such as Judge Mansfield can come to that conclusion after an exhaustive review of the record how possibly can

*The Second Circuit warning in *President's Council*, supra (p. 292) of the probability of "ensuing shouts of book burning, witch hunting and violation of academic freedom" was unerringly predictive of events.

Petitioners' actions be considered arbitrary and irrational.*

A review of the materials objected to (J.A. 30-42; 638 F. 2d pp. 419-422 F.N. 1) and of the public statements of the board at the time (J.A. 89-98) does not support a description of the board's actions as arbitrary or irrational.

A review of the depositions of the two members whom Petitioners chose to examine under oath also indicate a variety of reasons for their respective votes on the different books proscribed by the board. It becomes obvious that the board did not speak as a single precise voice, all objecting to the same aspect of each volume.

Defendant board is composed of seven members from varying backgrounds who voted variously with regard to the books in question. Mr. Nessim, Jewish, voted to place *Go Ask Alice* on a restricted shelf; to restore *The Fixer* to open shelves; and (along with Mr. Martin) to restrict *A Hero Ain't Nothin But A Sandwich*. The same Mr. Martin voted, with Mr. Michaels, to restrict *The Fixer*. (J.A. 27, 77-79). They all had varying reasons for their vote, but all were basically concerned about the lack of educational suitability of these volumes due to the rampant obscenities, vulgarity, gross sexual allusions, blasphemies (in 1 book) and their general bad taste (J.A. 9, 26, 28, 90-99, 103, 105, 107-110, 119, 120).

A board member should not be faulted for stating:

> I know in the past students have been suspended for

*For other judicial appraisals of some of the materials proscribed by Appellant board see *Todd v. Rochester Community Schools*, 200 N.W. 2d 90 (1972) (description of "Slaughterhouse-Five") and *President's Council*, supra, p. 291 (describing "Down These Mean Streets").

> using such language. That is my whole point. If you can't allow a student to use it in the classroom in a discussion or in a description of a particular teacher that he or she may not like, I don't see how you can justify using it in books that are used in the classrooms.

(Ahrens dep. at 113.) Nor can Frank Martin's three category system be faulted as irrational. Mr. Martin was very aware that a few expletives in a whole work might not justify proscription. He stated "if the words fit into the story, then, perhaps in some cases this enhanced the story" he would vote to keep the book on the shelves on a restricted basis. If, however, he "felt a book was just written for the purpose of using obscenities" or "it went into completely deviant behavior, explicit sex scenes, that type of thing" it was in category three which justified complete proscription. (Martin dep. at 28, 29.) These are not the workings of irrational minds. Mr. Martin had read four of the books in question even before he realized they were in the school library and had formed an opinion concerning them. (Martin dep. at 35; J.A. 23, 103) All board members had read each book before casting a vote on July 28 (J.A. 26, 103, 119). This does not support a charge of irrationality.

Viewed dispassionately the board's actions have been a rational, logical exercise of their discretionary powers. *Someone* has to make a choice regarding the educational suitability of instructional materials. It has already been shown that the staff professionals are not the proper parties (See Point I, p. 20) Nor are the parents, except through the duly elected school board which serves in their stead during the school day.* If a parent lacks the power (except through the elective process or by persuasion)

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*For an exposition of the doctrine of *in loco parentis* as it relates to public school affairs see *The Scope and Sources of School Board Authority to Regulate Student Conduct: A Nonconstitutional Analysis*, Goldstein, S., U. of Pa. L.J. 117: 373 at 377-84 (1969).

to compel a school board to adopt or to enjoin its discontinuance (assumedly on the basis of subjective criteria) and a student lacks similar power (as is here asserted), to deny a board such power would create a vacuum where value judgments have no place.

Such a vacuum is supported by the students' cries of "majoritarianism". A closer examination of the corporate nature of Petitioner school board and its rules of procedure will indicate that it can only operate through a majority. If four of its members wish to transfer an additional $20,000 to the library budget for acquisition of additional library materials and three desire to reduce the library allocation by a similar sum the majority prevails and the library receives the books. As can be seen from an examination of the board minutes pertaining to the book removals complained of (J.A.75 80), the majority prevailed and it must prevail in a municipal corporation. The majority also prevails at the annual board member elections at which Petitioners were re-elected on numerous occasions.* (J.A.-81).

The illogic of a charge of "majoritarianism" is aptly illustrated by the holding and reasoning of the court in a similar case involving the action of a school committee (board) in removing an anthology which contained what could only be called a vulgar poem from a school library. In *Right to Read Defense Committee v. School Committee of the City of Chelsea*, 454 F. Supp. 703 (D.C. Mass. 1978) where after describing the poem as employing "vivid street language, and legitimately offensive to some, *but certainly not to everyone-*" (emphasis provided) (at 714), the Court directed the return of the book to the school library (after a six day trial). The implication, of course, is that unless material is deemed offensive by "everyone" it enjoys constitutional sanction and justifies judicial intervention and a full

*By state statute one third of a seven member school board (2, 2 and 3 members) stand for election every year.

blown trial. This cannot be the wisest way to challenge the dangers of "majoritarianism."

Of equal interest, similarly illogical and also addressed in *Right to Read* (supra) is the concept of "a book acquiring tenure by shelving" which was sharply rejected by the Second Circuit in *President's Council* (supra) when the court (457 F. 2d 289 at 292) stated

> This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover.

However, bolstered by the holding in *Minarcini,* supra, (that permitted *Catch 22* not to be acquired by a board as a text or library book but enjoined its removal from a library (541 F. 2d at 577) the District Court in *Right to Read* compelled the restoration of the book to the shelf stating

> Clearly, a school committee can determine what books will go into a library and, indeed, if there will be a library at all. But the question presented here is whether a school committee has the same degree of discretion to order a book removed from a library. (at 711).

A similar theory asserted by teachers challenging the discontinuance of a number of books from existing courses of study has been rejected by the Tenth Circuit in *Cary v. Board of Education,* supra. There the teachers contended that "once the courses had been approved the teachers' 'right of academic freedom' includes the right to use non-obscene materials" in them. (598 F. 2nd at 543).

An understanding of the usual selection process is helpful in realizing the fallacy of a constitutionally protected tenure concept

for a public school library book. It is admitted that most boards of education rely upon the judgment of their library professionals in making single volume purchases (as contrasted with text-book selection which, at least in Island Trees, is commonly done by the board from ones submitted). Those professionals in turn, it is hoped, rely upon established and unbiased trade journals.

However, the lack of bias on the part of the professional and of the trade journal or book list publisher is an assumption not necessarily founded in fact. Many librarians are biased and/or incompetent (as are many of any other occupational group). Many may have prejudices of which they are not even aware. Coupling this factor with that already addressed (Point I, p. 17) of the changing nature of school district community attitudes over long periods, one has a situation where "wrong" books may end up on a library shelf, but the body duly constituted to transmit the community's values to the school students will not have the power to correct the "error" by a method which involves subjective value judgments of a board of education. The *Guidelines for The Selection of School Library Resources, Textbooks and Other Instructional Materials* issued by the New York State Board of Regents (which did not obtain at the time of the events complained of) makes no distinction between books that are on and those that are off a library shelf, nor, it is doubted, do any other selection guidelines. Nor should this Court make such a distinction.

It stands to reason that a school board which may eliminate the subject of higher mathematics or astronomy, or biology from its curriculum. (*Epperson v. Arkansas*, 393 U.S. 97 at 111, Black, J., concurring); may eliminate Contemporary Poetry as a course, (*Cary*, supra, (at 544)); may forbid instruction on the subject of birth control (*Mercer v. Michigan State Board of Education*, supra); may decide that the only foreign language to be taught in

its schools shall be Spanish (by analogy to the state power posited by Justice Stewart concurring in *Epperson*, supra (at 116)), or may decide whether to have a library at all (*Right to Read*, supra at 711) should not only have the admitted power to decline to select a volume *for* a library shelf for reasons "related solely to the social or political tastes of school board members" (*Minarcini*, supra, at 582), but should be permitted to take one *from* a library shelf for the same reasons.

c. The board's actions were not in furtherance of the suppression of ideas or otherwise unconstitutionally motivated.

Petitioner board members are unashamedly and unabashedly conservative in the traditional and generic sense of the word. They apply their conservative principles in the exercise of their duties as school board members in matters such as the hiring of a Superintendent, the establishment of a traditional K-8 grade organization, the formation of an ROTC unit in the schools (one of the only ones in the county), the establishment of curriculum, teacher negotiations and fiscal matters are decided on the basis of conservative principles. (J.A. 21, Ahrens dep. at 83, 84). They are "conservative" in their personal lives also and believe strongly in the traditional values. (Martin dep. pp. 24-25).

It is readily conceded that were the board to take actions such as those complained of in an effort to "aid or oppose" a particular religion, to prohibit the teaching of a "theory which is deemed antagonistic to a particular dogma" or to prohibit a teacher from mentioning "the very existence of an entire system of respected human thought" (*Epperson*, supra, at 106, 107, 116) its actions might be set aside. But this is not what Petitioner board has attempted and the record is crystal clear on this point. Not only have Respondent students not refuted any of the materials appended to the board's motion for summary judgment as required by Rule

56 (e), F.R. Civ. P., one of which was an affidavit by Superintendent Oglesby stating

> That the teaching staff is not now nor has it been to my knowledge prohibited directly or indirectly from explaining or teaching about any of the "banned" books nor from discussing them or the ideas they express in any manner. (J.A. 121)..

but they have unqualifiedly agreed pursuant to Local Rule 9 (g) that there has been no attempt to suppress the teaching of any of the doctrines, theories or ideas addressed by the proscribed materials (See Statement of The Case, p. J.A.-4). The board has not substituted rigid, exclusive indoctrination for their lawful prerogatives (*Zykan*, supra, 631 F. 2d. at 1306). (See also dissent of Mansfield, J. in court below, 638 F. 2d at 428).

The only factor other than an attempt at suppression of ideas that the court below considered as tainting the board's action was that of political motivation which was deemed the proper subject of trial inquiry by Judge Newman who concurred in the result (638 F. 2d. at 438).

Not only is "political" an "amorphous" term, but it is one which, if the basic nature of the nation's public schools and their operation as well as their proper role in inculcating community and national values is realized, is essential in any consideration of a school board's inherent function. This was understood by the U.S. Supreme Court when, in *Epperson*, supra, (at 113, 114) Mr. Justice Black concurring, implied that a teacher had no "right to teach sociological, economic, *political*, or religious subjects that the school's managers do not want discussed." (emphasis provided). The seventh Circuit has been even more explicit in the recognition of the inseparability of "politics" and the transmission of values by the nation's public schools. (*Zykan*, 631 F. 2d at 1305)

(See also *Ambach v. Norwick*, 441 U.S. 68 at 79, f.n. 9; Kay, V.O., *Public Opinion and American Democracy* (1961) at 316, 317; Cahill, R.S., *The Politics of Education in the Local Community* (1964) (at 36).

Even were "political" motivation impermissible constitutionally and even were Petitioners to have been "politically" motivated their actions would still pass constitutional scrutiny since a mixture of permissible and impermissable motivation does not vitiate an action. Although Judge Newman in concurring in the court below stated he felt the ruling regarding motivation in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) was inapposite (at 437, 438) it is submitted this is not the case. Mr. Doyle had no tenure, nor does a library book. There was no state-law requirement of "reasons" or "cause" to be given Mr. Doyle, nor is there one for a library book. Mr. Doyle had no "right" to receive the job in the first place, nor can a board be prevented from not placing a book on the shelves. By analogy a book which was obsolescent (which all will agree can be removed from a shelf at any time without fear of protracted litigation), but also objectionable for impermissible reasons might have its shelf life extended until a board was elected which complained solely of its obsolescence. The practical difficulty of ascertaining motivation and the Court's historical refusal to invalidate statutes because of improper motives was commented on in *Epperson*, supra, at 113 (Justice Black concurring) following his statement supporting the power of the state to withdraw from the curriculum "any subject deemed too emotional and controversial for its public schools." It is submitted that if whole subjects can be removed from a curriculum because of controversiality without investigation of motives certainly a "controversial" book may be.

d. The test of the constitutionality of the board's actions is not that of compliance with narrow and specifically defined regulatory criteria.

Although the majority opinion of the court below appears to mandate a decision against the board were it not to have followed narrowly and specifically drawn regulatory criteria (638 F. 2d at 416, 417) an examination of pertinent authority indicates such not to be required. Such a statement may have resulted from a presumption of similarity of the actions by Petitioners and those of a board attempting to "censor" a student publication. It is important, however, to realize that in the one case there is a pure form of third party expression involved while here it is extremely limited expression, if any.

It is submitted that the adoption of regulations which must of need take into consideration all of the conflicting constitutional, sociological and political imperatives appertaining to issues of this nature would be almost impossible. Such regulations would be a spawning ground for much litigation of the type attempted to be avoided here. The case against narrowly drawn and specific criteria has been aptly stated by the First Circuit in *Advocates for the Arts v. Thompson*, 532 F. 2d 792 where (at 797) it was stated (regarding a vulgar poem) that

> In the absence of ascertainable principles by which to define artistic merit, we see no reason to demand that official discretion in this area be hedged by "narrow, objective and definite standards"* *Shuttleworth v. City of Birmingham.*

*See comments by Goldstein, S., *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, U. of Pa. L. Rev. 124: 1293, at 1331 and f.n. 123 suggesting no preexisting standards required for constitutional removal of teachers for the teaching of offensive materials.

There are numerous tests that can be applied to ascertain the constitutionality of Petitioners' actions. They are of varying degrees of strictness. One general rule is that "As conduct becomes less and less like 'pure speech' the showing of governmental interest required for its regulation is progressively lessened" (citing law review articles) (*East Hartford*, supra 562 F. 2d. 838 at 858). Not only does the lack of "purity" of the speech of the student plaintiffs mitigate against them, but their age does also. In *Zykan*, supra, at 1306, student challenges of decisions by local educational authorities were held to require crossing "a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation." The governmental interest required has variously been held to be a "compelling state interest" (*Roe v. Wade*, 410 U.S. 113 (1973) at 178); a substantial state interest or merely "a legitimate state interest" (*Ambach v. Norwick*, 441 U.S. 68 (1979) at 59). That a state interest exists in regulating the availability of vulgar and indecent materials where juveniles are involved (*Pacifica*, supra,) or in transmitting community values to public school children is without question. Whether the interest is "compelling", "substantial" or merely "legitimate" is a matter of subjective judgment.

It is suggested that, rather than ascertain the precise nature of the interest to be protected, the Court balance the conflicting interests at stake in arriving at its decision. The interests in conflict are, on the one hand, the right (and duty) of a school board to transmit community values to those in its charge coupled with its statutory mandate, the obvious state interest in limiting the availability of vulgar materials to juveniles and the firm caveat of this Court in *Epperson*, supra, that the courts not intervene in the "resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values" (at 104) and, on the other hand, the limited and reciprocal "right" of expression of a secondary school student. This "balancing test" has received full acceptance,

especially in public school matters involving claims of freedom of speech, and is the more logical in the present instance. (*American Communications Ass'n. CIO v. Douds*, 339 U.S. 382 (1950); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284 (1977).* When such a test is applied to the case at bar the Petitioner school board cannot fail to prevail.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the summary judgment awarded petitioner, should be reversed.

Respectfully Submitted,

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*Any suggestion that the "substantial disruption" test of *Tinker v. Des Moines*, supra, should apply (see F.N. 9 of Newman concurrance in court below) is rejected by the Second Circuit in *Thomas*, supra, 607 F. 2d at 1055, 1057. See also Georgetown L.J. Content Regulation and the *First Amendment: A Revisionist View*, 68:727, 739-747 (1980).